Supreme Court, U.S.
FILED

No. 98 787 NOV 3 1998

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In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

William Sumner Scott,

Petitioner

v.

Cargill Investor Services, Inc.,
John Carlin, William Berger, and Hal T. Hansen

Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a limited partner of a Partnership have standing under Article III of the United States Constitution to bring an action for fraudulent representations made directly to him by third parties to induce him to maintain his investment in the Partnership and to surrender control of the Partnership and Corporate General Partner.

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William Sumner Scott ("Scott") hereby Petitions for a Writ of Certiorari be issued to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Court of Appeals decision (App., *infra*, A) dated May 1, 1998 is unreported. The Court of Appeals denial of the Petition for Rehearing and Suggestions of Rehearing En Banc (App., *infra*, B) dated August 5, 1998 is unreported. The District Court Order Granting Motion to Dismiss and Dismissing Case (App., *infra*, C) entered on February 26, 1997, at case number 96-781-CIV-NESBITT is unreported. The District Court's Omnibus Order granting Cargill's Motion to Dismiss (App., *infra*, D) entered on December 11, 1996 is unreported. The District Court Magistrate's Report and Recommendation (App., *infra*, E) entered on October 25, 1996 is unreported.

JURISDICTION

The final order of the Court of Appeals was the denial of Scott's Petition for Rehearing and Suggestion for En Banc Consideration (App., *infra*, B) on August 5, 1998. This Petition is filed, and the three hundred dollar ($300) fee paid, pursuant to 28 U.S.C. Section 1254 (1) and Supreme Court Rule 13.3, within ninety (90) days of the entry of the final order.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution
Article III-The Judiciary
Section 2.

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors,

> other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States, ..."

The Fifth Amendment to the United States Constitution provides, in relevant part: "no person shall . . .be deprived of life, liberty, or property, without due process of law ..."

The Securities Act of 1933, Section 22, provides:

> (a) The district court of the United States, the United States courts of any Territory, and the United States District Court for the District of Columbia shall have jurisdiction of offenses and violations under this title [§5 77a-77aa of this title] and under the rules and regulations promulgated by the commission in respect thereto, and concurrent with the state and territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendants may be found. . .
>
> 15 USC § 77v(a)

Commodity Exchange Act, 7 U.S.C. § 1, et seq., provides:

> § 1a(4), (5), and (12) defines the roles of the parties. They are futures commission merchants ("FCM"), commodity pool operators ("CPO") and commodity trading advisors ("CTA").

CFTC Regulations at § 12.13(a) provide:

> "(a) In General. Any person complaining of a violation of any provision of the Act or a rule, regulation or order of the Commission thereunder by any person who is registrant (as defined in § 12.2) may, at any time within two years after the cause of action accrues, apply to the Commission for a reparation award by filing a written complaint which satisfies the requirements of this rule."

The Florida Long Arm Statute, F.S. 48.193, provides:

> (1) Any person, ... who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself ... to the jurisdiction of the courts of this state for any cause arising from doing any of the following acts:
>
> (a) Operating, conducting ... a business venture in this state ...
>
> (b) Committing a tortious act within this state.
>
> .....
>
> (f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of injury, either:
>
> (1) The defendant was engaged in solicitation in this state ....

STATEMENT OF THE CASE

Professional managers who are paid a percentage of the profits they produce in a customer's trading account will not accept the delays and judgment interference attendant to customer approval. To induce professional managers to accept trading responsibility in return for incentive fees (*i.e.* only from profits produced), the securities industry has developed the use of a power

of attorney, which allows the manager to buy and sell securities directly with the broker, without customer involvement.

In response to the demand that trades be made without their involvement, mutual fund managers and commodity pool operators have instituted the use of a limited partnership with a corporate general partner to insulate them from personal liability for losses which may be created by the trades made directly to the broker by the independent trader. The brokers have adopted procedures and accepted the responsibility to prevent overdrafts in the power of attorney accounts.

William Sumner Scott, ("Scott"), individually, has brought this action against Cargill Investor Services, Inc. ("Cargill"), John Carlin ("Carlin"), William Berger ("Berger"), and Hal T. Hansen ("Hansen") to recover the loss caused by the false explanation to Scott by Carlin of how the Cargill power of attorney form is administered by Cargill. Carlin was motivated by the desire (i) to induce Scott to use the Cargill power of attorney to appoint an independent manager over a new $15,000 account under which Scott would have no control; and (ii) to also leave a substantial deposit at Cargill in Partnership accounts which would not be subject to the power of attorney and, according to Carlin, would remain under Scott's control as the sole shareholder of the General Partner.

The district court granted the Cargill Motion for Summary Judgment based upon Scott's lack of standing under Article III of the Constitution and upon the application of the principle of res judicata on the grounds that the CFTC reparation proceeding between the CSF Partnership and Cargill resolved the issues presented in this case. The court also granted the Carlin, Berger and Hansen Motion to Dismiss or, in the alternative, for Summary Judgment because Scott lacked standing and because the individual defendants had not consented to the jurisdiction of the Florida courts.

The Eleventh Circuit affirmed the lower court on the basis that Scott did not have standing under Article III of the Constitution. The history of the relationship of the parties follows.

On November 17, 1983, to insulate him from personal liability and to establish an audited performance record to justify the raise of money from other investors, Scott formed a limited partnership named Creative Strategy Fund I ("CSF", "Fund", or "Partnership") pursuant to the Pennsylvania Uniform Limited Partnership Act. The corporate general partner, during the time the accounts were open at Cargill, was Creative Strategies, Incorporated, a Delaware corporation, ("CSI" or the "General Partner"). Scott was the sole shareholder, director, and officer of the General Partner. The General Partner and Scott, as the limited partner, were the only partners of the Partnership.

The Commodity Exchange Act, 7. U.S.C. § 1, et seq. ("CEAct") § 1a(4), (5), and (12) defines the roles of the parties. They are futures commission merchants ("FCM"), commodity pool operators ("CPO") and commodity trading advisors ("CTA"). The functions of each of these entities are separate and distinct. Cargill was the registered FCM (*sic* broker), Creative Strategies, Inc. was the CPO and Robert Rowland ("Rowland") was the registered CTA. Rowland was totally independent from the Partnership, its general partner, and Scott.

During the period from 1983 until the last quarter of 1991, Scott, as the sole shareholder of the corporate general partner, was in complete control of all aspects of Partnership activities, including trading. To induce Scott to give-up control, Carlin, as agent of Cargill, with the approval of Berger and Hansen, attempted to solicit to Scott a limited power of attorney account assigned to an independent commodity trading advisor. In furtherance of this effort, Carlin, as agent of Cargill, with the approval of Berger and Hansen, represented to Scott that the only money to be used for margin for trades made pursuant to the power of attorney would be the money in the power of attorney account and, further, represented that Cargill would not use any of the

money in any other Partnership account to apply toward losses in the power of attorney account.

Based upon these representations, Scott relinquished control of the Partnership's trading in a $15,000 account by granting a power of attorney to Rowland.

Carlin and Cargill never intended the power of attorney to apply only to the account where the money was on deposit. The purpose of the fraud upon Scott was to induce him to leave $255,907.24 on deposit in two other accounts at Cargill. No right to trade the other two accounts was granted to Rowland. No right was granted to Cargill to look to those other accounts to use as margin or to pay for losses in the $15,000 account.

The entire loss at issue in this case was the result of trades placed by Rowland directly with Cargill pursuant to the Cargill standard form power of attorney. Cargill accepted total responsibility to manage the money on deposit in the power of attorney account.

Without the participation or knowledge of any management representative of the Partnership, Cargill allowed Rowland to place more positions in the account than the $15,000 on deposit would allow. From March 27 through April 6, 1992, the positions placed by Rowland directly to Cargill, without Scott's involvement, caused a loss of $508,358.08 in the Partnership's $15,000 power of attorney account.

Rather than admit it breached its obligation to properly manage the $15,000 account pursuant to its power of attorney form, Cargill elected to steal $255,907.24 from the two segregated partnership accounts over which no power of attorney had been granted. This action was in direct breach of the representations Carlin made to Scott, individually, to (i) induce him to give up control of the Partnership and the General Partner by appointing Rowland via the Cargill power of attorney and, (ii) after the

surrender of control, to leave his money on deposit at Cargill in the other two Partnership accounts.

The cause of action brought to the trial court and presently on review was the first and only action filed by Scott, individually. The trial court, with the approval of the circuit court, granted Cargill summary judgment and dismissed the claims against the individuals for want of jurisdiction because of the application of Article III of the Constitution, finding that Scott did not have standing to bring his claims. Scott asserts this is a misapplication of the Article III standing issue because the representations by Carlin were to Scott, individually, by use of the telephone from New York to Scott in Florida. Accordingly, the Florida long arm statute applies to bring the individual Defendants before the District Court in Florida.

The false representations made by Carlin to induce Scott to surrender control and also allow his money to remain on deposit at Cargill survived the creation and subsequent deposit of money into the power of attorney account. In addition, a determination of the obligations of Cargill to the Partnership under the CEAct or obligations of the individual Respondents to the Partnership under Florida law does not extinguish Scott's right to bring an action for the lies Carlin told him to cause him to relinquish his control of the General Partner over trading in the power of attorney account. Scott was not a party to either the CFTC or the Florida state court action.

The lower courts determined that Scott lacked "standing" to bring an action against the Respondents. The 11th Circuit specifically cited *Saladin v City of Milledgeville*, 812 F. 2d 687 (11th Circuit 1987) which quoted this Court's determination of the essence of a standing question to be whether the Plaintiff has alleged "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult constitutional questions." *Baker v Carr*, 369 U. S. 186, 204, 82 S. Ct. 691, 703, 7 L.Ed.2d 663 (1962).

The lower courts then determined that the prior litigation, which was lost by the Partnership before the CFTC and the State of Florida, denied Scott standing to bring an action against Carlin and the other Respondents for the misrepresentations Carlin made directly to Scott. The ruling by the 11th Circuit is directly contrary to the application of the standing test applied by this Court in *North Eastern Fla. Chapter Associated Gen. Contractors of America v. Jacksonville*, 508 U. S. 656, 663-664, 113 S. Ct. 2297, 2301-2302, 124 L.Ed.2d 586 (1993).

This Court in *North Eastern,* at 663, cited *Lujan v Defenders of Wildlife*, 504 U. S. 555, 560 (1992) to establish that the test for standing is met when the Plaintiff demonstrates (1) "injury in fact," by which we mean an invasion of a legally protected interest that is "(a) concrete and particularized, and (b) actual of imminent, not conjectural or hypothetical". It was illegal for Carlin to make false statements to Scott to induce him to act. Scott did act, the statements were specific and made directly to Scott, and Scott lost his money as a direct result of reliance upon Carlin's misrepresentations. Carlin lied to Scott as the agent of Cargill with the approval of Berger and Hansen.

The fact the Partnership or the General Partner may have claims against these same parties for violations of the Commodity Exchange Act, 7 U.S.C. § 1, et seq., or breach of contract or tort under Florida Law do not divest Scott of his claims against them for the fraud they perpetrated against him, individually, to cause him to give up his control and maintain his investment in the Partnership. *Carlanda Corp. v Rogers & Ford Const.* 605 So.2d 1014 (Fla. App. 4 Dist. 1992). Scott satisfied the Article III standing test.

The lower court have denied Scott's right to a trial of the issues guaranteed to him by the Fifth Amendment of the U. S. Constitution.

THE PROCEEDINGS BELOW

On February 7, 1994, Creative Strategy Fund I (the "CSF Partnership") brought a reparations proceedings pursuant to the Commodity Exchange Act, 7 U.S.C. §1, et seq. before the Commodity Futures Trading Commission (the "CFTC"), at CFTC number 94-R055, against Cargill and Robert A. Rowland and The Rowland Brothers Company (collectively "Rowland") to claim that they breached the terms of a Cargill standard form of power of attorney which permitted Rowland to place trades in a $15,000 Partnership account directly with Cargill without the involvement of the CSF Partnership. By Order dated March 30, 1995, the Administrative Law Judge (the "ALJ") issued an Initial Decision which found that the Partnership failed to establish by a preponderance of the evidence that Cargill and Rowland had violated the CEAct in connection with their handling of Account Nos. 66805, 66806 and 98468. *Creative Strategy Fund I v Cargill Investor Services, Inc.*, et al, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) 26,357 (ALJ Mar. 30, 1995).

By Order dated April 26, 1996, the CFTC affirmed the initial decision of the ALJ, without opinion, but also said the initial decision shall not be an expression of CFTC views. *Creative Strategy Fund I v Cargill Investor Services, Inc., et al*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. 26,682 (CFTC Apr 26, 1996).

The CSF Partnership's attempt to appeal the CFTC decision to the Circuit Court was dismissed on June 11, 1996, for failure to post a bond equal to twice the amount the CFTC determined was due from the CSF Partnership to Cargill. *Creative Strategy Fund I v CFTC*, No. 96-4793 (11th Circuit filed June 21, 1996).

On May 1, 1995, the CSF Partnership and its corporate general partner sued Cargill Investor Services, Inc., John Carlin, Robert Rowland, Ross Rowland, Sr. and The Rowland Brothers Company, Inc. in the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida at case number 95-3463 to

allege breach of contract in Count I, breach of fiduciary duty in Count II and fraudulent transfer in Count III. By Order dated September 12, 1995, the Florida Circuit Court granted the Defendants Motion for Summary Judgment based upon the claim that all of the issues had been resolved by the CFTC Order cited above.

On October 25, 1996, USDC Magistrate Judge Barry L. Garber issued a Report and Recommendation in *Scott v. Cargill*, Carlin, Berger and Hansen (96-0781-CIV-NESBITT, 96-1966-CIV-FERGUSON), in which he recommended that Defendants' Motion to Dismiss be granted. (App. E).

On December 13, 1996, Judge Nesbitt issued an Omnibus Order which granted Cargill's Motion to Dismiss. (App. D).

On February 26, 1997, Judge Nesbitt granted the individual Defendants' Motion to Dismiss. (App. C).

On May 1, 1998, the Eleventh Circuit Appeals Court affirmed that ruling. (App. A)

On August 5, 1998, the Eleventh Circuit Appeals Court denied Scott's Petition for Rehearing and Suggestion of Rehearing En Banc. (App. B)

REASONS FOR GRANT OF THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS WHICH AFFORDS STANDING, BASED UPON DIVERSITY JURISDICTION, UNDER ARTICLE III OF THE CONSTITUTION TO PERSONS WHO SUFFER DIRECT INJURY AS A RESULT OF ACTIONS OF THIRD PARTIES WITHOUT REGARD TO THE FACT THAT OTHER PARTIES MAY HAVE A CAUSE OF ACTION

ARISING OUT OF THE SAME OCCURRENCE WHICH WAS LOST IN COURT.

Control over partnership affairs is a separate legal consideration. *Metge v Bachler*, 762 F.2d 621, 631(8th Cir. 1985), cert. Denied, 474 U. S. 1957, 106 S. Ct. 798, 88 L. Ed. 2d 774 (1986). *Brown v Enstar Group, Inc.*, 84 F. 3d 393, 396 (11th Cir. 1996). The fraud to induce Scott to surrender of control of the Partnership affairs is a separate event from the losses created by the breach of contract and fraud practiced by Cargill against the Partnership.

The significance of control was announced in *Lowendahl v. Baltimore & Ohio Railroad Co.*, 247 App.Div. 144, 287 N.Y.S. 62, affirmed 272 N.Y. 360, 6 N.E.2d 56 and cited with approval in *Fisser v. International Bank*, 282 F. 2d 231 (2nd Cir. 1960) at page 238 as follows:

> "'Restating the instrumentality rule, we may say that in any case, except express agency, estoppel, or direct tort, three elements must be proved:
>
> '(1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> '(2) Such control must have been used by the defendant to commit fraud or worse, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> '(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.' [247 App. Div. 144, 287.]"

Yet, without an analysis of the relationship of the parties or a hearing to produce a record, the lower courts ruled that Scott had no standing under Article III of the Constitution to bring a cause of action based upon the fraudulent inducement to surrender control of the Partnership, and they also disregarded the well plead allegation, supported by Scott's affidavit, that the fraud was committed by telephone from New York to Florida.

As evidenced by the trial court's denial of Respondent's claim for attorney fees, the facts of this case do not justify the dismissal of the Complaint based upon lack of jurisdiction of the subject matter because the claim was so attenuated and unsubstantial as to be absolutely devoid of merit. (App. D, p. 5, ¶ 4). And, no further consideration of the merits of the claim is relevant to a determination of the court's jurisdiction of the subject matter. *Baker v Carr*, 369 U. S. 186, 199.

In this case, Scott's Complaint, supported by the uncontroverted facts present by his Affidavit, presented issues of fact for determination by the trial court. The grant of summary judgment by the trial court, which was affirmed by the panel, was caused, in part, by the belief that the CEAct grants the right to the CFTC to hear all causes of action and, therefore, the principles of res judicata apply to bar the claims of Scott. A thorough review of the CFTC Regulations, Part 12, paragraph § 12.13(a) will demonstrate that reparations is limited to interpretation of the CEAct and, therefore, neither Scott nor his claims were barred by the prior CFTC reparation proceedings between the CSF Partnership and Cargill.

CFTC Regulations at § 12.13(a) provide:

> "(a) In General. Any person complaining of a violation of any provision of the Act or a rule, regulation or order of the Commission thereunder by any person who is registrant (as defined in § 12.2) may, at any time within two years after the cause of action accrues, apply to the Commission

for a reparation award by filing a written complaint which satisfies the requirements of this rule."

Scott, individually, had no right under this provision to participate in any CFTC reparation proceeding. The CFTC ruled in a prior proceeding which involved facts similar to the CFTC proceeding at issue in this case (except that the brokerage firm was Prudential Securities, Inc. rather than Cargill), that Scott individually, could not be a party to the CFTC action. By Order of May 5, 1993, the ALJ specifically ruled in the *Creative v Prudential* case that Prudential could not proceed against Scott, individually, before the CFTC. *Creative Strategy Fund I v Prudential Securities, Inc., Robert Rowland and the Rowland Brothers, Inc.* [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) at paragraph 26,010 (Initial Decision Feb. 23, 1994).[1]

This provision also limited the questions to be resolved by reparations to alleged violations of the CEAct. The claims of Scott raised by his Complaint filed to the lower court are not based upon alleged violations of the CEAct and, therefore, could not have been considered by the CFTC. *Dohmen-Ramirez v CFTC*, 837, F2d 847, 859, n 15 (9th Cir 1988); *Dorn v. Shearson Hayden Stone*, (1977-1980 Transfer Binder) Comm. Fut. Law Rep. (CCH) #20,611 (ALJ, May 12, 1978).

In *Dorn*, at paragraph 14 on page 22,571, the ALJ specifically provides that CFTC regulations do not allow a respondent in a reparations case to interplead additional parties or institute an action against a third party in the nature of a cross-claim. In addition, the *Dorn* decision holds that claims between parties other than those between a registered person and the account

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[1] Prudential brought a claim in arbitration against Scott personally which resulted in an award against him. Scott filed a Petition to Vacate the award to the United States District Court for the Northern District of Georgia which was denied. Scott appealed to the 11th Circuit which affirmed the District Court Decision. *Scott v Prudential*, 141 F.3d 1007, (11th Cir 1998). On October 26, 1998, Scott filed a Petition for Writ of Certiorari to this Court at case number 98-680.

holder are outside the jurisdiction of the CFTC. *Dorn* at Paragraph 11, on page 22,517. Accordingly, it was impossible for Scott to adjudicate his rights against the Respondents in the CFTC proceeding between the Partnership and Cargill.

Further, Scott's case is distinguishable from *Hlavinka v Blunt, Ellis,* 174 Wis. 2d 381; 497 NW 2d 756; 1993 Wisc. App. Lexis 119 which involved alleged violations by the registered representative during the time the account was traded which were specifically ruled to be between the customer and the FCM and, therefore, within the purview of the CEAct. No such ruling was made by the trial court in this case, nor could there have been such a ruling.

The Florida long arm statute, F.S. 48.193, provides:

> (1) Any person, ... who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself . . . to the jurisdiction of the courts of this state for any cause arising from doing any of the following acts:
>
> > (a) Operating, conducting ... a business venture in this state ...
> >
> > (b) Committing a tortious act within this state.
> >
> > . . . . .
> >
> > (f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of injury, either:
> >
> > > (1) The defendant was engaged in solicitation in this state ....

Scott alleged in his complaint that the fraud occurred during one or more telephone conversations from New York to Florida. In addition, by his affidavit, Scott affirmatively proved that Cargill

maintained an office in Miami, Florida, and had consented to jurisdiction of the Florida Courts as a condition to the maintenance of that office. All of the Respondents abandoned the no jurisdiction of the Florida Courts argument prior to the entry of the final order.

Assuming the Respondents had not abandoned that argument, the solicitation of Scott to give up control of the partnership and also maintain his investment in the Partnership was the solicitation of a security within the scope of the national service of process authorized under the Securities Act of 1933.

The core concept of the Federal Rule regarding service of process provides that a particular defendant may be included in a lawsuit, if that defendant or the dispute concerning the defendant has sufficient "contacts" with the forum for the court to exercise jurisdiction over the defendant. West, Federal Civil Rules Handbooks §§ 2. 3-2. For jurisdiction to be constitutional, the defendant must have "contacts" with the state in which the court sits of such a quality and nature that exercise of personal jurisdiction would not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed.2d 95 (1945).

The operational facts set forth in Scott's Complaint, telephone calls to Scott in Florida, and maintenance of an office in Florida to do business, clearly show that all of the Respondents had sufficient contact with the State of Florida to be subject to its courts. Cargill is authorized to do business in Florida and all business between Scott and Carlin was to Scott in Florida.

Scott invoked Federal subject matter jurisdiction under Section 22 of the Securities Act of 1933. 15 USC § 77v. That Federal statute contains specific language conferring jurisdiction over a defendant. This language serves as a notice for purposes of the "contact" requirement for jurisdiction. 15 USC § 77v(a) provides, in part:

> "(a) The district court of the United States, the United States courts of any Territory, and the United States District Court for the District of Columbia shall have jurisdiction of offenses and violations under this title [§5 77a-77aa of this title] and under the rules and regulations promulgated by the commission in respect thereto, and concurrent with the state and territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendants may be found ...".[2]

Under the express language of this statute, jurisdiction may be invoked in the district where either the defendant is found or transacts business or where the transaction occurred.

The complaint and Scott's affidavit allege activity by Carlin and Cargill in Florida, and Berger and Hansen supervised those

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[2] The provisions of the Securities and Exchange Act of 1934, 15 USC §§ 78aa and 80b-14 contain nearly identical requirements as to where such actions may be brought.

§ 78aa provides:

> "any suit or action to enforce any duty or liability created by §§ 78a-78d, 78e-781, 78m-78o, 78o-3-78hh of title 15 may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business; and, § 80b-14 provides such action to enjoin violations of §§ 80b-1 - 80b-21 or rules, regulations or orders thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business or may be found."

activities. All transactions occurred in Florida. Additionally, by use of their Miami, Florida office, all of the Respondents can be found in Florida. Assuming jurisdiction is not found by the actual conduct of business in Florida or the Florida long arm statute, jurisdiction is invoked, pursuant to Section 22 of the Securities Act of 1933, 15 USC §§ 77v.

A look at the application of Section 22 to bring persons outside the boundaries of the state in which the court sits is best exemplified by the case of *Bersch v Drexel, Firestone, Inc.*, 389 F. Supp. 446 (S. D. N. Y., 1974), aff'd in part, rev. in part, on other grounds 519 F.2d 974, cert. denied, 96 S. Ct. 453, 423 U. S. 453, 46 L.Ed.2d 389, where the actions of the Defendants in the State of New York were sufficient to bring in the participants from all over the world even though the ultimate representations or inducements do not appear to have occurred in the United States. *Bersch*, at page 457.

Control of the Partnership and the amount of money on deposit not covered by the power of attorney are questions which are separate from the breach of contract and fraud claims brought by the partnership against the Respondents in State Court. And, therefore, res judicata and lack of standing do not apply to Scott's claims which are outside the CEAct and do not involve the Partnership's claims of breach of contract and fraud against the Respondents.

Scott, as the President of the General Partner or as the limited partner of the Partnership, had no right to force the Partnership or the General Partner to bring an action on his behalf for the fraud which induced him to give up control of the Partnership and leave his money on deposit in the Partnership. *Wuisin v Palmetto Federal Savings & Loan Ass'n,* 507 So. 2d 1149, Fla. 3d DCA 1987).

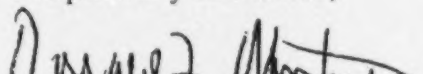
To the contrary, Scott's claim against Carlin arose out of a different set of facts (the lies told to induce Scott to surrender control) and at a different time (three months prior to the loss in the

account). Because the fraud by Carlin was directed to Scott, individually, Scott has a separate cause of action against these Respondents.

CONCLUSION

This Court is requested to accept review of this case to preserve the right of parties to adjudicate their claims before the Federal Courts pursuant to Article III of the Constitution of the United States.

Respectfully submitted,



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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-4440
Non-Argument Calendar

D.C. Docket No. 96-781-CV-LCI

WILLIAM SUMNER SCOTT,

Plaintiff-Appellant,

versus

CARGILL INVESTOR SERVICES, INC., JOHN CARLIN, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

(May 1, 1998)

BEFORE TJOFLAT, EDMONDSON and BARKETT, Circuit Judges.

PER CURIAM:

William Sumner Scott, a lawyer, appeals the entry of summary judgment for the defendants and the dismissal of his pro se diversity complaint arising from his allegations that the defendants fraudulently induced him to invest funds through his solely owned business entities, Creative Strategy Fund and Creative Strategies, Inc., and then ignored his instructions to limit his losses while trading commodities on his behalf. On appeal, Scott contends that the district court erred in granting summary judgment to the defendants on the ground that his action was barred by the doctrine

of res Judicata as a result of prior legal actions brought by him through Creative Strategy Fund and Creative Strategies Inc. on the same claim.

Based upon our review of Scott's complaint, defendants, motions to dismiss and for summary judgment, we conclude that the district court correctly dismissed Scott's complaint for lack of standing. Because Scott fails to meet the threshold requirement of standing, as required by Article III of the Constitution for there to be a case in controversy, we need not consider the remaining arguments related to the underlying merits of Scott's case. *See Saladin*, 812 F.2d at 690.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-4440

WILLIAM SUMNER SCOTT,

Plaintiff-Appellant,

versus

CARGILL INVESTOR SERVICES, INC., JOHN CARLIN, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(opinion _____, 11th Cir., 19__, ___ F.2d)

Before: TJOFLAT, EDMONDSON and BARKETT, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 96-781-CIV-NESBITT

WILLIAM SUMNER SCOTT,

Plaintiff,

VS.

CARGILL INVESTOR SERVICES, INC.,
JOHN CARLIN, WILLIAM BERGER
and HAT T. HANSEN,

Defendants.

ORDER GRANTING MOTION TO DISMISS AND
DISMISSING CASE

This cause comes before the Court upon Plaintiff's Objections to the October 25, 1996 Report and Recommendation filed November 1, 1996 and Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment filed February 14, 1997.

FACTUAL BACKGROUND

Plaintiff has brought two actions based on essentially the same fact pattern before this Court after unsuccessfully litigating this dispute before the Commodities Future Trading Commission, the 15th Judicial Circuit in and for Palm Beach County, and the Eleventh Circuit Court of Appeals. In all of these fora, the Courts have ruled against Plaintiff in this dispute[1] and the Plaintiff now seeks redress in the Federal District Court for the Southern District of Florida.

---

[1] The Commodities Futures Exchange Commission dismissed the initial reparations action which alleged breach of contract, intentional tort and negligence. The Florida Circuit Court for the

In this case, Plaintiff William Sumner Scott ("Scott") has brought a ten count Complaint against Cargill Investor Services and three individual Defendants for various state claims as well as a violation of RICO, 18 U.S.C. § 1962, and the Commodities Exchange Act, 7 U.S.C. § 1 et seq.. This Court granted Summary Judgment, on res judicata grounds, in favor of Cargill Investor Services on August 6, 1996 and now only the claims against the Individual Defendants remain.

On December 13, 1996, this Court dismissed the sister case, 96-1966-CIV-NESBITT, finding that the District Court for the Southern District of Florida was not the proper forum to entertain an appeal of a CFTC. In that December 13, 1996 Order, the Court deferred ruling on Plaintiff's Objection to the Report and Recommendation of Magistrate Judge Garber regarding the personal jurisdictional issues raised until Counts V, VI and IX have been resolved. The Court noted that Scott' s Claims under RICO, 18 U.S.C. 1962, (Count V and VI) and The Commodities Exchange Act, 7 U. S. C § 1, et seq., (Count IX) state federal claims for or which there is a national service of process and under these claims the Individual Defendants are properly within the personal jurisdiction of the Court. Those Counts have now been fully briefed and the Court will address those claims before it addresses the objections to the Report and Recommendation.

DISCUSSION

I. Counts V, VI and IX (RICO and, CEA)

Fifteenth Judicial District, Palm Beach County, granted Summary Judgment against Plaintiff on the same allegations. The Eleventh Circuit Court of Appeals dismissed two appeals to vacate the decision of the Commodities Futures Exchange Commission for failure to post the statutorily required bond.

Defendants request that this Court either dismiss Counts V, VI and IX for failure to state a claim upon which relief may be granted or grant them summary judgment because the counts alleged are either barred by the doctrine of Res Judicata or Scott lacks the standing to bring this suit personally. Scott refuses to accept the unfavorable decisions rendered against him by both the CFTC and the Florida Circuit Court for the Fifteenth Judicial and is now attempting to avoid the doctrine of res by suing the Individual Defendants along with their Cargill and by bringing the suit in his individual instead of in the partnership's name. Scott's sole unsubstantiated argument in opposing the Motion for Summary Judgement on res judicata grounds is that he is now suing in his individual capacity.

The doctrine of res judicata prevents the parties to a final judgment or their privies from relitigating issues that were or could have been litigated in that action. *Empire Fire & Marine Ins. Co. v. J. Transport*, 880 F.2d 1291, 1293 (11th Cir. 1989); *Olmstead v. Amoco Oil Co.*, 725 F.2d 627, 631-32 (11th Cir. 1984); *Signo v. Fla. Farm Bur. Cas. Ins. Co.*, 454 So.2d 3, 5 (Fla. 4th DCA 1984). It is irrelevant that Scott now purports to be bringing his claims in his individual capacity, rather than as the partnership to which he was a shareholder, or against the Individual Defendants instead of Cargill, because res judicata bars subsequent actions by the parties or their privies. See *Olmstead*, 725 F.2d at 632 (emphasis added). It is likewise unavailing that Scott has added claims not previously brought before the state court or the CFTC. "The bar extends not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same 'operative nucleus of facts.'" Id. (quoting *Lovely v. Laliberte*, 498 F.2d 1261 (1st Cir. 1973). Any claims that Scott could not have brought in his reparations proceeding before the CFTC, see *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), were extinguished in his actions in Florida Circuit Court.

In the case of *Lary v. Ansari*, 817 F.2d 1521 (11th Cir. 1987), the Eleventh Circuit held that a RICO claim would be barred in a subsequent proceeding if the underlying issues were litigated to an unfavorable conclusion in a previous suit. The Court found that:

> Because (Plaintiff] had an opportunity to litigate claims relating to his business relationship with (Defendant], any future claims relating to the same business relationship are barred by res judicata. Although styled as a RICO claim, the complaint here relies on the same allegations of misconduct by [Defendant] as did the prior Suit. The present action against [Defendant] is therefore barred by res judicata.

Lary, 817 F.2d at 1523. Likewise, in this case, the underlying fraud claims were litigated in the state and CFTC proceedings and thus Scott's subsequent RICO claim is barred as well as his claim under the Commodities and Exchange Act.

Even if Scott's claims were not precluded by res judicata, Scott has no standing as a stockholder in CST to sue the Individual Defendants. Under Florida law, an individual stockholder cannot maintain an action in his own name and must instead bring the action in the corporation's name when the injury is to the corporation and not the stockholder. *Lincoln Oldsmobile, Inc. v. Barnch*, 547 So.2d 1111 (Fla 2d DCA 1990). Similarly, a suit on behalf of a limited partner must be brought in the name of the limited partnership or by a general partner. *Wuisin v. Palmetto Federal Savings & Loan Ass'n*, 507 So.2d 1149 (Fla. 3d DCA 1987). Complaints alleging a violation of RICO must either state with specificity the harm done to the shareholder as distinct from the corporation, or be subject to the same bar to the shareholder's standing. *Warner v. Alexander Grant & Co.*, 828 F.2d 1528, 1531 (11th Cir. 1987) ; Crocker v. FDIC, 826 F.2d 347, 352 (5th Cir. 1987).

In Scott's Complaint, Scott identifies himself as the sole limited partner in the CSI partnership. Scott alleges all harms done to him individually as a direct result of the business relationship between the partnership and Cargil. These claims must, and have in previous litigation, be brought in the name of the partnership instead of Scott personally. Thus, these Counts must also be

dismissed because Scott lacks the standing to bring this suit in his own name.

II. State and Common Law Claims and the Report and Recommendation

With the dismissal of the Counts of Scott's Complaint which provide for a national service of process, the Report and recommendation can now be addressed. Upon a de novo review of the matter including Defendant's Motion to Quash and to Dismiss for lack of Personal Jurisdiction and Plaintiff's Response and objections to the Magistrate's Report and Recommendation, this Court adopts Magistrate Judge Garber's Report and Recommendation and finds that the Individual Defendants did not have sufficient contacts to provide this Court with personal jurisdiction over them. Additionally, even if this Court were to find that Individual Defendants were within the personal jurisdiction of this Court, the remaining Counts of the Complaint would still be barred by Plaintiff's lack of standing and the doctrine of res judicata.

Accordingly, it is hereby

ORDERED AND ADJUDGED as follows:

1. Plaintiff's Objections to Magistrate Garber's Report and Recommendation filed November 1, 1996 are OVERRULED. And Counts I, II, III, IV, VII and VIII are DISMISSED for lack of personal jurisdiction over the Individual Defendants.

2. Individual Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment is GRANTED and the case is CLOSED.

All other motions in 96-781-CIV-NESBITT, not previously ruled on, are hereby DENIED AS MOOT.

DONE and ORDERED, in Chambers, Miami, Florida, this 26 day of February, 1997.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Barry L. Garber
William Scott Sumner, Esq.
Stuart J. McGregor, Esq.
Clint R. Losego, Esq.
William S. Leibman, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 96-781-CIV-NESBITT
Case No. 96-1966-CIV-NESBITT

WILLIAM SUMNER SCOTT,

Plaintiff,

vs.

CARGILL INVESTOR SERVICES, INC., JOHN CARLIN, WILLIAM BERGER and HAT T. HANSEN,

Defendants.

CREATIVE STRATEGY FUND I,

Petitioner,

vs.

CARGILL INVESTOR SERVICES, INC.,

Respondent,

and

COMMODITY FUTURES TRADING COMMISSION,

Respondent/Intervenor.

OMNIBUS ORDER

This cause comes before the Court upon Plaintiff's objections to the October 25, 1996 Report and Recommendation filed November 1, 1996 (96-781), Respondent Cargill Investor Services, Motion to Dismiss or in the Alternative for Summary Judgment and for Attorney's Fees filed September 11, 1996 (96-1966), Individual Defendants' Motion for a Protective Order filed November 26, 1996 (96-781), Respondent/Intervenor Commodities Future Trading Commission's Motion to Dismiss filed October 7, 1996 (96-1966), and Respondent/Intervenor Commodities Future Trading Commission's Motion for a Protective Order Filed November 19, 1996 (96-1966).

FACTUAL BACKGROUND

Plaintiff has brought two actions based on essentially the same fact pattern after unsuccessfully litigating this dispute before the Commodities Future Trading Commission, the 15th Judicial Circuit in and for Palm Beach County, and the Eleventh Circuit Court of Appeals. In all of these fora, the Courts have ruled against Plaintiff in this dispute[1] and the Plaintiff now seeks redress in the Federal District Court for the Southern District of Florida.

In 96-781-CIV-NESBITT, Plaintiff William Sumner Scott ("Scott") brings a ten count Complaint against Cargill Investor Services and three individual Defendants for various state claims as well as a violation of RICO, 18 U.S.C. § 1962, and the Commodities Exchange Act, 7 U.S.C. § I et seq.. This Court granted Summary Judgment in favor of Cargill Investor Services

---

[1] 'The Commodities Futures Exchange Commission dismissed the initial reparations action which alleged breach of contract, intentional tort and negligence. The Florida Circuit Court for the Fifteenth Judicial District, Palm Beach County, granted Summary Judgment against Plaintiff on the same allegations. The Eleventh Circuit Court of Appeals dismissed two appeals to vacate the decision of the Commodities Futures Exchange Commission for failure to post the statutorily required bond.

on August 6, 1996 and now only the claims against the individual Defendants remain.

In 96-1966-CIV-NESBITT, Creative Strategy Fund I ("CSI") represented by William Sumner Scott, requests that this Court vacate the decision of the Commodities Futures Exchange Commission and remand this issue for reconsideration to the Commodities Futures Exchange Commission. This is essentially the same request that CSF petitioned to the Eleventh Circuit Court of Appeals which was dismissed for failure to properly post the statutorily required bond.

DISCUSSION

I. 96-781-CIV-NESBITT

Scott objects to the findings of Magistrate Judge Garber and requests that the Court deny Individual Defendants Motion to Dismiss for Lack of Personal Jurisdiction. upon a review of the record, however, the Court notes that Scott's Claims under RICO, 18 U.S.C. § 1962, (Count V and VI) and The Commodities Exchange Act, 7 U.S.C. § 1, et seq., (Count IX) state federal claims for which there is a national service of process. Thus, under these claims the Individual Defendants are properly within the personal jurisdiction of the Court. In light of the fact that these Counts are not addressed in the Individual Defendant's Motion to Dismiss, and any ruling on Magistrate Garber's Report and Recommendation would not resolve this action until those Counts are addressed, the Court will defer ruling on the Report and Recommendation until the sufficiency of the pleadings of Counts V, VI and IX are resolved.

II. 96-1966-CIV-NESBITT

CSF in a Three Count Complaint, requests that this Court vacate the decision of the Commodities Futures Exchange Commission which affirmed an arbitration proceeding pursuant to 7 U.S.C. § 7a(11). CSF alleges that the federal district courts have

jurisdiction to hear this claim, pursuant to the Federal Arbitration Act, 9 U.S.C. S 1, et seq., because the initial proceedings in the action before the Commodities Futures Exchange Commission was an arbitration hearing. Respondent, Cargill Investor Services, however, contends that Jurisdiction properly rests before the Eleventh Circuit Court of Appeals, pursuant to 7 U.S.C. § 18(e), because all orders under the Commodities Exchange Act are appealable directly to federal circuit courts.

Federal district courts lack the jurisdiction to hear cases seeking to vacate an order of the Commodities Futures Exchange Commission. Under the Commodities Exchange Act, "Any order of the Commission entered hereunder shall be reviewable on petition of any party aggrieved thereby, by the United States Court of Appeals for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located..." 7 U.S.C. § 18(e). The Eleventh Circuit has held that where "Congress has provided a statutory procedure for the review of an administrative order, such procedure is exclusive." Green v. Brantley 981 F.2d 514, 520. Thus, any final order from the Commodities Futures Exchange Commission can not be appealed to the federal district courts and must instead be appealed to the Eleventh Circuit Court of Appeals.

Plaintiff's argument that the Federal Arbitration Act, 9 U.S.C. § 1 et seq., applies to the initial arbitration and thus provides this Court with jurisdiction to hear this case is inapposite. The arbitration in this matter occurred pursuant to U.S.C. § 7a(11) and that decision was properly appealed on April 10, 1995 to the Commission. On April 26, 1995, when the Commission issued its Summary order upholding the arbiter's decision, that decision became a Final Order of the Commission and is governed by the requirements of 7 U.S.C. § 18(e) and jurisdiction to hear appeals vests with the Eleventh Circuit Court of Appeals.

Therefore, this Court lacks the jurisdiction to hear this case and Plaintiff should properly post a bond and file this matter with the Eleventh Circuit as required by statute.

Accordingly, it is hereby

ORDERED AND ADJUDGED as follows:

1. Plaintiff's Objections to Magistrate Garber's Report and Recommendation filed November 1, 1996 are DEFERRED.

2. Individual Defendants are directed to file any Motions to Dismiss Counts V, VI, and IX with this Court by January 24, 1997, so that this issue and the Report and Recommendation of Magistrate Garber can be properly before the Court.

3. Individual Defendants' Motion for a Protective Order filed November 26, 1996 is GRANTED. Discovery in this matter is hereby STAYED until the Court rules on the outstanding Motions to Dismiss.

4. Respondent Cargill Investor Services' Motion to Dismiss or in the Alternative for Summary Judgment and for Attorney's Fees filed September 11, 1996 is GRANTED IN PART AND DENIED IN PART. Respondent's Motion to Dismiss is GRANTED. Respondent's Motion for Attorney's Fees is DENIED.

5. Respondent/Intervenor Commodities Future Trading Commission's Motion for a Protective Order Filed November 19, 1996 is DENIED AS MOOT.

6. Respondent/Intervenor Commodities Future Trading Commission's Motion to Dismiss filed October 7, 1996 is DENIED AS MOOT.

7. All other motions in 96-1966-CIV-NESBITT, not previously ruled on, are hereby DENIED AS MOOT.

DONE and ORDERED, in Chambers, Miami, Florida, this 11 day of December, 1996.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES DISTRICT JUDGE

cc:
William Scott Sumner, Esq.
Stuart J. McGregor, Esq.
Clint R. Losego, Esq.
William S. Leibman, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 96-0781-CIV-NESBITT
CASE NO. 96-1966-CIV-FERGUSON
MAGISTRATE JUDGE GARBER

WILLIAM SUMNER SCOTT

Plaintiff,

VS.

CARGILL INVESTOR SERVICES, INC., JOHN CARLIN, WILLIAM BERGER, and HAL T. HANSEN

Defendants.

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court pursuant to an Order of Reference entered by the Honorable Lenore C. Nesbitt, United States District Judge. This Report and Recommendation is hereby submitted on the following Motions:

(1) Defendants' Motion to Dismiss Based on Lack of Personal Jurisdiction.

(2) Defendants' Motion to Consolidate. BACKGROUND

This action constitutes Plaintiff's third attempt at litigating the issues revolving around his loss of funds in the Futures Trading Market, wherein he utilized the services of Cargill Investor Services ("Cargill"). The Commodities Futures Exchange Commission dismissed his initial reparations action, which alleged breach of contract, intentional tort and negligence. Subsequently, the Florida Circuit Court for the Fifteenth Judicial District, Palm

Beach County, granted Summary Judgment against him on his claims of breach of contract, breach of fiduciary duty, and fraudulent transfer. In his current complaint, Plaintiff sued not only Cargill, but certain of it's employees, alleging breach of contract, negligence, fraud, strict liability, frustration of commercial purpose, and RICO violations. On August 6, 1996, the Honorable Lenore C. Nesbitt granted Summary Judgment in favor of defendant Cargill on grounds that this action was barred under the doctrine of res judicata. However, the case remains pending as to Cargill employees Carlin, Berger and Hansen who have filed a Motion to Dismiss for Lack of Personal Jurisdiction.

DISCUSSION

In Order to establish personal jurisdiction over a non resident defendant in this Court, a Plaintiff must show:

(1) there is jurisdiction under the Florida long-arm statute',

F.S. 48.193 provides in relevant part:

(1) Any person, ... who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself . . . to the jurisdiction of the courts of this state for any cause arising from doing any of the following acts:

(a) Operating, conducting ... a business venture in this state ...

(b) Committing a tortious act within this state.

. . . . .

(f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of injury, either:

(1) The defendant was engaged in solicitation in this state ....

and

(2) there are sufficient minimum contacts so that any assertion of personal jurisdiction is consistent with the Due Process Clause. *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990); *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 855 (11th Cir. 1990).

The Eleventh Circuit has described personal jurisdiction analyses as follows:

> First, the plaintiff must allege sufficient facts in his complaint to initially support long-arm jurisdiction before the burden shifts to the defendant to make a prima facie showing of the inapplicability of the Statute. If the Defendant sustains his burden, the plaintiff is required to substantiate the jurisdictional allegations in the complaint by affidavits or other competent proof, and not merely reiterate the factual allegations in the complaint. *Polskie Linie Oceaniczne v. Seasafe Transport*, 795 F.2d 968 (11th Cir. 1986) (quoting *Bloom v. A.H. Pond Company*, 519 F.Supp 1162, 1168 (S.D. Fl 1981).

Hence, under Florida law, the Plaintiff has the burden of pleading sufficient facts to justify application of the long-arm statute. *Burger King Corporation v. CPM & F, INC.*, 537 F.Supp 651 (S.D. FL 1982). In attempting to establish jurisdiction under section 48.193, the plaintiff must do more than allege facts that show only a possibility of jurisdiction. *Holton v. Prosperity Bank of St. Augustine*, 602 So.2d 659 (Fla. 5th DCA 1992).

Upon examination of the complaint here, the Court finds hardly any assertion of facts which would subject the individual Defendants to Florida's Long-Arm Statute. With regard to

Defendants Berger and Hansen, all that is alleged is that they supervised the activities of Defendant Carlin. In essence, Plaintiff is attempting to use the jurisdictional "coattails" of Carlin to bring the other two within the purview of Section 48.193. With regard to Carlin, the complaint never mentions the Florida Long-Arm Statute or how Carlin is subjected to it. From reading Plaintiff Is Response to the Defendants' Motion to Dismiss, he appears to allege the following acts which would bring Defendants within section 48.193:

1. An intentional tort by Defendants' against Plaintiff aimed at Florida and causing injury here.

2. The Defendants solicited business in Florida.

3. The Defendants engaged in business activities within the State.

However, a review of the complaint discloses that it is devoid of factual allegations to support these claims. In fact, the only allegations in the complaint specific to Florida are:

1. While in Florida, Plaintiff called Carlin in New York, who explained the use of power of attorney forms. (complaint, Paragraph 21).

2. Wrongs were committed by Defendants, in part, within the Southern district of Florida. (complaint, paragraph 2).

These facts alone do not establish that Defendants operated a business, solicited business or committed a tort in Florida. Plaintiff does allude to other conversations with Defendant Carlin (complaint, paragraphs 26, 27, 28, 30, 31, 36, 37, 38), however it is unclear where the parties were when these discussions took place, who called whom, and whether the alleged discussions took place as part of one long phone call, or several separate phone calls. In analyzing whether Defendants solicited business or engaged in business activities in Florida, we would note that in the complaint,

Plaintiff states that Carlin was known to Plaintiff "because of the relationship they had established while Plaintiff served as Executive Vice President of the Corporate General Partner of Bermuda Fund..." (Complaint, Paragraph 14). It is not at all clear from this paragraph that it was the Defendants who affirmatively took steps to solicit and conduct business in Florida. Equally troubling is the fact that in all of Plaintiff's references to conversations with Carlin (ie: complaint, paragraph 31) there are no facts presented to the effect that Defendants did business in Florida. The facts only establish that Plaintiff was a customer of Defendants who resided in Florida. However, merely because a customer of a business or individual resides in Florida does not in and of itself subject the business or individual to personal jurisdiction in this state. As the Fifth Circuit stated in *Stuart v. Spademan*, 772 F.2d 1185 (1985), an exchange of communications between a resident and a non-resident in developing a contract is insufficient of itself to be characterized as purposeful activity invoking the benefits and protection of the forum State's laws. Regarding Plaintiff's allegation of an intentional tort directed into the state, the Court could not find any such allegations contained in the complaint.

Plaintiff's failure to allege a factual bases for personal jurisdiction is a critical omission, because in order to invoke a statutory right, a pleader must allege ultimate facts to activate the statute or show how the statute applied. *Life Laboratories, Inc. v. Valdes*, 387 So.2d 1009 (Fla. 3d DCA 1980). In his Response Memorandum, Plaintiff states that the activities of the Defendants here parallel the facts in *Citicorp Ins. Brokers v. Charman*, 635 So.2d 79 (Fla. 1st DCA 1994). However, the Court in Citicorp held that to invoke Long-Arm jurisdiction over a foreign corporation, the activities of the corporation must be considered collectively and show a general course of business activity in the state for pecuniary benefits. Id at 80. (quoting *Foster, Pepper & Riviera v. Hansard*, 611 So.2d 581, 582 (Fla. 1st DCA 1992). Here, as stated supra, Plaintiff merely alleges isolated incidents which do not establish business dealings in the State. Also, in Citicorp, the Plaintiffs established personal jurisdiction by pleading that defendant corporation had derived commissions of almost $600,000 in

Florida and utilized in "ten years" forty placement brokers, which brokers made twenty four trips to Florida in the five year period prior to the complaint, among other contacts. *Id.* These are exactly the kinds of allegations of continuous solicitation and business dealings that the Plaintiff has not included in his complaint.

Even if the Court were to find that Carlin engaged in some type of "solicitation" of business from Plaintiff, the Florida Supreme Court has held that the Florida Long-Arm Statute Section 1(f) will not confer personal jurisdiction in Florida if the alleged in-state injury caused by the outside activity is merely an economic injury. See *Aetna Life and Casualty v. Therm-O-Disc, Inc.*, 511 So.2d 992 (Fla. 1987). Hence, as far as personal jurisdiction is concerned, Plaintiff's Complaint is fatally defective.

CONCLUSION AND RECOMMENDATION

Accordingly, the undersigned hereby

RECOMMENDS as follows:

(1) that Defendants' Motion to Dismiss be GRANTED.

(2) that Defendants' Motion to Consolidate be DENIED as MOOT. The parties have ten (10) days from the date of this Report and Recommendation to file written objections, if any, with United States District Judge Lenore C. Nesbitt. See 28 U.S.C. §636 (1991). Failure to file timely objections may bar the parties from attacking on appeal the factual findings contained herein. *LoConte v. Dugger*, 847 F.2d 745, 750 (11th Cir.), cert. denied, 488 U.S. 958 (1988).

RESPECTFULLY SUBMITTED at the United States Courthouse, Miami, Florida this 25th day of October, 1996.

BARRY GARBER
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

U.S. District Judge Nesbitt
U.S. District Judge Ferguson
Counsel of record
William Sumner Scott